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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Marathon Oil Company (Marathon), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which reversed a judgment of the United States District Court for the Eastern District of Illinois granting petitioner (plaintiff) the relief it sought.

OPINION BELOW.

The opinion of the court of appeals (App. 1)[1] is reported at 358 F.2d 34.

JURISDICTION.

The judgment of the court of appeals was entered on March 3, 1966 (App. 1). A timely application for rehearing was denied on March 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court of appeals failed to follow Illinois law when it held that a railroad company had acquired by condemnation proceedings conducted in 1853 under an 1852 Illinois statute, not only an easement in the lands condemned for a right of way, but also the oil and gas deposits under the lands.

2. Whether the court of appeals failed to follow Illinois law when it held that the contiguous landowners did not mature under the Illinois statute of limitations title by adverse possession to a strip of land included in the right of way condemned by the railroad, but situated outside of its right of way fence, after the district court had found that the contiguous owners had claimed, used and occupied adversely the excluded strip for the statutory period.

STATUTES INVOLVED.

An Illinois statute styled "An Act to Amend the Law Condemning Right of Way for Purposes of Internal Im-

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[1] "App." refers to the appendix to this petition. "App. — C.A." refers to the Appendix filed in the court of appeals by respondents (defendants-appellants). "Supp. App. — C.A." refers to the Supplemental Appendix filed in the court of appeals by petitioner (plaintiff-appellee).

provement'' in force June 22, 1852[2] (Act of 1852). (App. 29-34).[3]

Section 1 of an Illinois statute styled ''An Act in regard to limitations'' approved April 4, 1872, Laws 1871-1872, p. 556, Illinois Revised Statutes (1961) Ch. 83 ''Limitations'', § 1. (App. 35).

STATEMENT.

This action was brought by petitioner to enjoin respondents from drilling a well on, and producing oil and gas from, a railroad right of way. Diversity jurisdiction of the district court was invoked because plaintiff was a citizen of Ohio, defendant Gail Heath (Heath) a citizen of Illinois and defendant The Baltimore & Ohio Railroad Company (B & O Rd.) a citizen of Maryland. Petitioner is the owner of the oil and gas leasehold estates on the lands contiguous to the right of way in dispute and its leases cover the oil and gas deposits under the right of way if the Ohio and Mississippi Railroad Company (O & M Rd.) predecessor of B & O Rd. did not acquire title to the mineral deposits when it condemned the right of way for the purpose of laying its tracks.

The O & M Rd. acquired the right of way in controversy by two condemnation proceedings instituted in 1853 in an Illinois state court (Supp. App. — C.A. 16-27, 28-37). By the Act of 1851, its legislative charter, the railroad was given the right to condemn land for railroad purposes

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[2] §§ 7-24 inc., ch. 92 "Right of Way", Gross Statutes of Illinois 1818-1869, 3d ed.

[3] Two other Illinois statutes were alluded to in the opinion of the court of appeals (a) "An act to incorporate the Ohio and Mississippi Railroad and for other purposes" in force Feb. 12, 1851 (Act of 1851) (App. 36-39); (b) "An Act to Provide For a General System of Railroad Incorporations" approved November 5, 1849 (Act of 1849) (App. 40-45)—officially published as §§ 39-84 inc., ch. 86a "Railroads", Gross Statutes of Illinois 1818-1869, 3d ed.

(App. 38). The 1853 condemnation proceedings were instituted and conducted under the Act of 1852. The court of appeals so correctly held (App. 3-4, 4 fn. 4); however, it construed that Act differently from the way the Act was construed by the district court, and in so doing the court of appeals departed from the law of Illinois. *Infra* 6-16.

The O & M Rd., after having condemned the lands, fenced its right of way, and for more than 60 years it has excluded from its enclosures a part of the condemned lands. These excluded lands have been claimed and used by the owners of the contiguous lands for the statutory period of limitation and leased to petitioner.

By its findings of fact, conclusions of law and decree,[4] the district court construed the 1853 condemnation proceedings—which it held were conducted under the Act of 1852—as vesting in the railroad an easement in the lands taken for a right of way, but not as vesting in it the right to take and appropriate the underlying oil and gas deposits. It found and concluded that title to these deposits remained in the persons who owned the lands at the time of the condemnations, and that their title had vested, by mesne conveyances, in plaintiff and its lessors (App. 16, 18, 22, 24-25, 27).

The district court also found and concluded that the railroad had abandoned a portion of the condemned right of way, and that plaintiff's predecessors in title who owned the contiguous land and plaintiff, who owned the oil and gas leasehold estates on such lands, had matured title by adverse possession to the abandoned portion situated outside the fence erected by the railroad (App. 13-14, 18, 27).

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[4] Printed in the Appendix 9, 17, 24. The district court did not write an opinion, but following the hearing and before rendition of a decision, it ordered both sides to submit briefs and proposed findings of fact, conclusions of law and decree, which was done.

The decree enjoined the defendants from drilling for oil and gas on the right of way and ordered them to abandon and plug a well they drilled after plaintiff had instituted this action (App. 27-28).

The findings and decree of the district court were reversed by the court of appeals.

REASONS FOR GRANTING THE WRIT

I.

The Question Is Important.

Important to the jurisprudence of Illinois is a uniform construction by state and federal courts of its eminent domain statutes on which rests the title to thousands of acres of its lands. Chaos will surely follow if the quantum of the estate acquired in ancient eminent domain proceedings under old statutes of Illinois depends on whether the case is tried in a state or a federal court. It can truly be said that the impact of the decision below is not limited to the parties and the particular lands involved in this action, for railroad tracks, highways, roads, streets and drainage canals cross many large oil fields and coal mines over easements acquired in condemnation proceedings instituted decades ago under the 1852 Act or other similar Acts.

Even under primary methods of operation, where oil and gas are produced by means of natural energy in the reservoir, parties in control of strips and small tracts of land can and do prevent the orderly and economic development of oil and gas resources. The obstacles created by long narrow strips and small tracts of land are multiplied in secondary recovery operations which necessitate the injection of water, gas, fire or other substances into the reservoir to create artificial energy for removing the oil and

gas.[5] In Illinois the economic well-being of the oil industry, with corresponding benefit to thousands of private landowners, depends quite heavily upon secondary recovery operations. The havoc will be unjustifiably compounded by the precedent established by a federal court decision not in accord with Illinois law, as will be the situation if the decision of the court of appeals is allowed to stand.

The decision below is in conflict with well established rules of law in Illinois concerning the strict construction of eminent domain powers, the necessity of an express legislative grant of the power to take a fee, the limitation on the estate taken to that only necessary to accomplish the public purpose to be served and with Illinois decisions denying the right to condemn a fee under specific condemnation statutes containing no broader grant of power than that contained in the Act of 1852.[6]

II.

The Decision Is Wrong.

1. A railroad possessing the power of eminent domain could take under Section 1 of the Act of 1852 property for either of two purposes, namely, (1) "if the right of way

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[5] This is exactly what happened here. Petitioner has owned oil and gas leases contiguous to the railroad right of way which are dated as far back as 1906 and has produced oil and gas from some of those lands for a period of about 60 years. During all that time no effort was made to drill a well on the right of way and produce oil from it. It was only when petitioner started a water flooding program in the area that defendants drilled on the right of way.

[6] The court below departed, without justification, from its own rule, as well as that in other courts of appeals, that a district court's considered view as to the law of the state in which it sits is entitled to great weight and will be accepted on review unless shown to be clearly wrong. *Wisconsin Screw Co.* v. *Fireman's Fund Insurance Co.*, 297 F.2d 697, 701 (7th Cir. 1962); *Shackleton* v. *Food Machinery and Chemical Corp.*, 279 F.2d 919, 922 (7th Cir. 1960).

only is desired'' and (2) if the property ''is required for all or any of the other purposes herein specified.'' (App. 29). The property to be taken is subsequently referred to in other sections of the Act as ''right of way over or across lands'' or the ''right of way over or upon each lot of land.'' (App. 30, 32). Involved here is the construction of the Act only insofar as it authorized a taking for right of way. Of great significance is the failure of the Act to authorize the taking of a fee title to lands or the underlying minerals for right of way purposes.

In the petitions,[7] reports of commissioners and otherwise throughout the 1853 condemnation proceedings the purpose of the taking is repeatedly referred to as a ''right of way'', a ''roadway'', a ''roadbed'', or as being necessary for the ''track'' of the railroad (Supp. App. — C.A. 19, 24, 25, 30, 35, 38).

The quantum of the estate which passes under Illinois law when these words are used was clearly announced in *Tallman* v. *Eastern Illinois & Peoria R. R.*, 379 Ill. 441, 446-447, 41 N.E.2d 537, 540 (1942), where the Supreme Court of Illinois in holding that only an easement passed said, ''The words 'right of way' denote a tenure by which land is held. They are descriptive of the easement right and not the land to which it is affixed''. Also in *Kurz* v. *Blume*, 407 Ill. 383, 385, 95 N.E.2d 338, 339 (1950), the Illinois Supreme Court, citing the *Tallman* case, *supra*, forcefully expressed the law when it said, ''It is settled

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[7] The court of appeals afforded some significance to the fact the petitions requested that upon payment ''the owners . . . may be required to make and deliver . . . a conveyance or release in fee'' to the O & M Rd. (App. 4), but the owners never made and delivered such a conveyance and could not do so because they were minors. Moreover, even though they had not been minors, they could not have been required to convey a fee under the language of the 1852 Act. *Infra* 15 fn. 13.

that a right of way is an easement (citation). . . ." The *Tallman* decision has been recognized as the established law of Illinois by this Court in *Carter Oil Co.* v. *Welker,* 317 U.S. 592 (1942),[8] and even by the court below in *Hicks* v. *Thomson,* 127 F.2d 1001 (7th Cir. 1942), cert. den. 317 U.S. 659 (1942), reh. den. 317 U.S. 708 (1942). Other Illinois cases following the same rule are *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, 520-521, 30 N.E.2d 24, 26-27 (1940); *Texas Co.* v. *O'Meara,* 377 Ill. 144, 150-152, 36 N.E.2d 256, 258-259 (1941); *Carter Oil Co.* v. *Myers,* 105 F.2d 259, 261 (7th Cir. 1939).

Moreover, under Illinois law an easement would have sufficed for the purposes of the taking under the 1853 condemnation proceedings; consequently no greater estate could have been taken. *Tacoma Safety Deposit Co.* v. *City of Chicago,* 247 Ill. 192, 198-199, 93 N.E. 153, 156 (1910); *Miller* v. *Commissioners of Lincoln Park,* 278 Ill. 400, 406, 116 N.E. 178, 181 (1917). If the decision below is allowed to stand, a railroad will be permitted to take by condemnation for its private use oil and gas deposits under its right of way even though the deposits are not essential to the purposes for which the land is taken and will not be put to a public use. Such a result is contrary to Illinois

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[8] The history of this case has significance for the case at bar. The district court construed a deed as conveying to a railroad a fee simple title to lands acquired for right of way purposes. *Carter Oil Co.* v. *Welker,* 24 F. Supp. 753 (E.D. Ill. 1938). The court of appeals affirmed that judgment. *Carter Oil Co.* v. *Welker,* 112 F.2d 299 (7th Cir. 1940). This court granted certiorari, *Carter Oil Co.* v. *Welker,* 311 U.S. 633 (1940), and on the authority of *Tallman* v. *Eastern Illinois and Peoria R.R.,* 379 Ill. 441, 41 N.E.2d 537 (1942), reversed the judgment of the court of appeals. *Carter Oil Co.* v. *Welker,* 317 U.S. 592 (1942). So again here, as in the *Welker* case the exercise of this Court's power of supervision is necessary to correct the erroneous decision of the court below. The importance of doing so is also illustrated by the *Welker* case.

law as succinctly announced in *Sears* v. *City of Chicago*, 247 Ill. 204, 216-217, 93 N.E. 158, 161 (1910), as follows: "A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use."

The reports of the appraisers in the two 1853 condemnation proceedings (Supp. App. — C.A. 23-26, 34-35) show that the compensation awarded the landowners was for the right the railroad had acquired to build its tracks across their lands. No award was made for the lands, and certainly no award was made for the minerals under the right of way. In this regard, Mr. Justice Holmes in *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 415 (1922), said, "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for."

2. Under Illinois law not even a city acquires an estate in lands greater than an easement where the city condemns the land for street purposes under statutes containing a broader grant of the power of eminent domain than that contained in the Act of 1852. Although the City of Chicago had authority under a statute—its legislative charter of February 14, 1851[9]—to "appropriate and take lands", nevertheless the Supreme Court of Illinois held it acquired only an easement in lands taken for street purposes under its broad charter powers. *Tacoma Safety Deposit Co.* v. *City of Chicago*, 247 Ill. 192, 93 N.E. 153 (1910); *Illinois Trust & Savings Bank* v. *City of Chicago*, 247 Ill. 264, 93 N.E. 167 (1910). In the *Tacoma* case the court said, "This property was condemned in 1851 *and at that time there*

[9] "An Act to reduce the law incorporating the City of Chicago and the several Acts amendatory thereof, into one Act, and to amend the same" in force February 14, 1851, Private Laws of Illinois 1851, p. 132.

was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes. . . ." 247 Ill. at 197, 93 N.E. at 155. (Emphasis supplied.) Nor did the Act of 1852, which the court below held was the act under which the O & M Rd. condemned the lands in dispute, authorize a railroad "to take the fee of real estate for [trackage] purposes."

Under the Illinois Cities and Villages Act,[10] municipalities were granted the right to take "private property . . . for public use," but it was again held by the Supreme Court of Illinois that a city condemning lands for street purposes under the Act acquired only an easement. *Sears* v. *City of Chicago,* 247 Ill. 204, 93 N.E. 158 (1910); *Illinois Central R.R.* v. *City of Chicago,* 138 Ill. 453, 28 N.E. 740 (1891).

Certainly the Act of 1852 did not authorize the O & M Rd. to condemn any greater estate for right of way purposes than did the City of Chicago legislative charter of February 14, 1851, construed in the *Tacoma* and *Illinois Trust* cases, *supra,* or the Cities and Villages Act of July 1, 1872,[11] construed in the *Sears* and *Illinois Central* cases, *supra.* For this reason the court below should have followed the Illinois law as announced in those cases.

3. The district court followed the Illinois law when it construed the Act of 1852 strictly, and so should the court

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[10] "An Act to provide for the incorporation of cities and villages," in force July 1, 1872, Public Laws of Illinois, 1871-1872, p. 218.

[11] The fact that these are the statutes which are respectively construed in the cases cited partially appears from the opinions but that was further confirmed by a personal inspection by counsel of the records on appeal for those cases which are still on file in the office of the Clerk of the Illinois Supreme Court.

of appeals. Under Illinois law the taking of property by exercising the right of eminent domain is in derogation of private rights, and statutes and condemnation proceedings under which lands are taken must be construed strictly. A fee simple title cannot be taken by condemnation except under a legislative grant of power which is either express or arises by necessary implication from the language of the legislative grant. *Tacoma Safety Deposit Co.* v. *City of Chicago,* 247 Ill. 192, 198, 93 N.E. 153, 155-156 (1910); *Illinois Central R.R.* v. *City of Chicago,* 138 Ill. 453, 458, 28 N.E. 740, 741 (1891); *Superior Oil Co.* v. *Harsh,* 39 F. Supp. 467, 471 (E.D. Ill. 1941); *Illinois State Trust Co.* v. *St. Louis I. M. & S. Ry.,* 208 Ill. 419, 422-423, 70 N.E. 357, 358 (1904). The Act of 1852 neither expressly nor impliedly granted railroads the right to take by condemnation the mineral deposits under lands condemned for trackage purposes.

4. The court of appeals cited and quoted from two cases in which it said the Supreme Court of Illinois had "considered" the 1852 Act (App. 5-6). These two cases were the only authorities cited for its construction of the Act. Neither case is applicable.

In the first, *Bartlow* v. *C. B. & Q. R.R.,* 243 Ill. 332, 90 N.E. 721 (1909), the railroad, relying upon condemnation proceedings previously conducted under the Act of 1852, asserted in a partition suit title to a strip of land upon which its tracks had been laid. The decision was that the railroad had no title whatever to the strip because in the condemnation proceedings none of the money awarded by the appraisers had been paid to the five minor children who were the remaindermen, but all of it was paid to their

mother, a life tenant, who in the meantime had died. In the portion of the opinion quoted by the court below (App. 5) the terms "entire property", all the title to the property", and "including the fee simple and all lesser estates" were used to designate whatever the property interest may have been which was sought to be condemned, whether a fee, an easement, a license or any kind of an estate recognized by law. Consequently, all that the Supreme Court of Illinois said or intended to say was that whatever may have been the property interest which was sought to be condemned, the proceedings were directed at the interests of all the property owners, and the compensation was awarded for, but not paid to, all of them. It never reached for decision the question of the nature of the title or quantum of interest acquired for a right of way by condemnation under the Act of 1852.

In the other case, *Keen* v. *C. C. & St. L. Ry.*, 392 Ill. 362, 64 N.E.2d 499 (1945), there was before the Supreme Court of Illinois for construction a voluntary deed, and not the Act of 1852 or any other statute. The quotation by the court below (App. 5-6) from that case contained a reference to the Act of 1852 but the quoted language was expressed by the Supreme Court of Illinois in connection with the issue of the corporate power of the railroad to hold fee title to real estate. As a corollary to the holding that the deed conveyed a fee, it merely stated that the Act of 1852 and the legislative charter of the railroad gave the railroad the corporate power to acquire and hold the fee simple title to land for some purposes. The quotation in the opinion of the court below from the *Keen* case (App. 5-6) very clearly misstates the decision in the *Bartlow* case, *supra*. It is significant too that in the *Keen* case, the Illinois Supreme Court distinguishes that case from *Tallman* v. *Eastern Illinois & Peoria R.R.*, 379 Ill. 441, 41 N.E.

2d 537 (1942), *supra* 7-8, and recognizes the *Tallman* decision as still being the law of Illinois.

The *Bartlow* and *Keen* cases, *supra,* do not hold that a railroad took fee simple title to lands acquired for a right of way by condemnation under the Act of 1852. In neither case was there before the Illinois Supreme Court the issue as to the quantum of estate—that is fee or easement—acquired by a railroad for trackage purposes under the 1852 Act. Therefore the quotations by the court below from these cases (App. 5-6) are obiter dicta and not controlling authority for the case at bar. *Webster* v. *Fall,* 266 U.S. 507, 511 (1925); *Armour & Co.* v. *Wontock,* 323 U.S. 126, 132-133 (1944); *Village of Lombard* v. *Illinois Bell Telephone Co.,* 405 Ill. 209, 219, 90 N.E.2d 105, 111 (1950); *Shackleton* v. *Food Machinery and Chemical Corp.,* 279 F.2d 919, 922 (7th Cir. 1960).

5. The court below should not have afforded significance to the Act of 1849 in construing the nature of the title acquired by the O & M Rd. in the 1853 condemnation proceedings (App. 3) after it had correctly concluded that the proceedings were not prosecuted under the 1849 Act but under the Act of 1852 (App. 3-4, 4 fn. 4). Having held that the 1852 Act was controlling, it was immaterial as to the kind of an estate which could have been taken under the Act of 1849. The O & M Rd. having elected to conduct the 1853 proceedings under the Act of 1852, the rights of the parties and the title acquired are governed by the 1852 Act.[12] *Peoria, Pekin & Jacksonville R.R.* v.

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[12] The fact that the charter of a company gives it the specific right to condemn under one statute does not restrict it to that statute and it may instead proceed under the law governing eminent domain in effect at the time of the proceedings. *East St. L. & C. Ry. Co.* v. *Belleville City Ry. Co.,* 159 Ill. 544, 548-550, 42 N.E. 974, 975-976 (1896).

Black, 58 Ill. 33 (1871); *Peoria, Pekin & Jacksonville R.R.* v. *Laurie*, 63 Ill. 264 (1872). On this proposition where this very Act of 1852 and an alternative statute were involved, it was said in the *Laurie* case: "* * * We think from the character of the proceedings as instituted, and the direct reference made to the Act of 1852, that the company must be governed by that Act, and that the rights of the parties must be controlled by it." 63 Ill. at 266.

Moreover in assigning importance to language found in the 1849 Act but omitted from the 1852 Act, the court below took action which is just the reverse of that dictated by a cardinal rule of statutory construction. While it did not analyze in its opinion the 1849 Act nor refer to any of its provisions, nevertheless it obviously was swayed by the provisions of Section 22 of the 1849 Act. This section after calling for the filing of the commissioner's report (App. 44) and for the entry of a "rule" relative to the award (App. 44), provides:

> "Upon the entry of such rule the said Corporation shall become seized in fee of all the lands and real estate described in said rule as required to be taken as aforesaid—during the continuance of the Corporation by this or any subsequent act and may take possession of and hold and use the same for the purposes of said Road . . . ." (App. 44)

The court below must have had this section in mind when it said the Act of 1849 contemplated the taking of a fee by a railroad for use in the construction of its tracks (App. 3). We respectfully submit that it was wrong in its construction of the 1849 Act,[13] but assuming arguendo it

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[13] The language above quoted from Section 22 of the Act of 1849 would allow the railroad to be seized of the lands only "during the continuance of the corporation" or so long as the lands were used "for the purposes of said Road". That does not constitute a fee simple and certainly does not include the oil and gas. See *Smith*

was right, nevertheless the 1849 Act is of no consequence in the case at bar because the Act of 1852 omitted the provisions found in Section 22 of the 1849 Act referred to and partially quoted above. The omission is significant. It demonstrates that even if the Illinois legislature did intend to confer on a railroad power to condemn a fee for trackage under the 1849 Act, such was not its intention when it omitted from the 1852 Act the language in the 1849 Act which conferred that power. Where two alternative statutes exist relating to the same subject matter which were passed at different times and provisions are omitted from the last statute which appeared in the first one, the court, in construing the last enactment, will presume that the legislature intended to wrought a change in the purposes of the statutes. Consequently when the Illinois legislature did not carry into the Act of 1852 language it employed in the Act of 1849, it has to be presumed that since both Acts cover the same subject matter a change in the law was intended. *Maneja* v. *Waialua Agriculture Company*, 349 U.S. 254, 268 (1955); *Village of Atwood* v. *Cincinnati, I. & W. R.R.*, 316 Ill. 425, 147 N.E. 449, 451 (1925); *Hall*

Canal or Ditch Co. v. *Colorado Ice & Storage Co.*, 34 Col. 485, 82 P. 940 (1905), where a statute almost identical to the Act of 1849 was construed as allowing the taking of only an easement in lands because that would suffice for the purpose, constructing and operating a ditch, and it was said such language as that appearing in the Act of 1849 does not mean a technical fee. The court below also ignored its own decision in *Hicks* v. *Thomson*, 127 F.2d 1001 (7th Cir. 1942), cert. den. 317 U.S. 659 (1942), reh. den. 317 U.S. 708 (1942), where it held that a railroad was granted only an easement in lands acquired for its tracks by two deeds, first, an 1863 deed reciting that it was "to have and to hold . . . for railroad purposes only" and, second, an 1870 deed covering the same and additional lands reciting "to have and to hold said strip of land . . . for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken by condemnation. . . ."

v. *Baylous*, 109 W. Va. 1, 153 S.E. 293, 296, 69 A.L.R. 527 (1930); 82 C.J.S. Statutes § 366; 2 Sutherland, Statutory Construction (3rd ed. 1955) § 4510. Instead of concluding that the provisions of the 1849 Act were indicative of the quantum of the estate which the O & M Rd. took in lands for right of way by the 1853 proceedings, the court below should have concluded that the absence of these same provisions from the Act of 1852, under which the proceedings were conducted, was indicative that the estate which was taken was different from that which could have been taken had the proceedings been brought under the 1849 Act.

6. The opinion of the court of appeals contains citations of cases announcing in a broad general way elementary principles of the law of adverse possession relative to the necessity of such possession being actual, visible, exclusive and hostile and the insufficiency of casual and permissive possession. The court has misapplied the Illinois law of adverse possession. As the district court found, the evidence concerning the adverse possession for more than 20 years by the owners of contiguous lands of a strip included in the original right of way but situated outside of the right of way fence met all requirements of the Illinois law and perfected title to that strip in the contiguous landowners under the applicable statute, Illinois Revised Statutes (1961) Ch. 83 "Limitations", § 1 (App. 35). Of significance is the fact that the court of appeals completely overlooked important Illinois cases involving directly the question of adverse possession of railroad rights of way in which the facts are almost identical to those in the case at bar and the issues were found against the railroad. *Donahue* v. *Illinois Central R.R.*, 165 Ill. 640, 46 N.E. 714 (1897); *Illinois Central R.R.* v. *Houghton*, 126 Ill. 233, 18 N.E. 301 (1888); *Illinois Central R.R.* v.

O'Connor, 154 Ill. 550, 39 N.E. 563 (1895). The court of appeals did not state that the findings of the trial judge were clearly against the weight of the evidence. Its judgment is a flagrant violation of the rule that great weight must be attached to the findings of the trial judge sitting as the chancellor in equity cases and where his findings are supported by substantial evidence they will not be reversed unless clearly against the weight of the evidence.[14]

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] Rule 52, F.R.C.P., 28 U.S.C.A.; *Aetna Ball & Roller Bearing Co.* v. *Standard Unit Parts Corp.,* 198 F.2d 222, 225 (7th Cir. 1952); *Edwards* v. *Lain,* 112 F.2d 343, 346, 347 (7th Cir. 1940); *Solomon* v. *Benjamin,* 75 F.2d 564, 566 (7th Cir.), cert. den. 295 U.S. 749 (1935).